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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

JUAN CORCHADO JUARBE, Director,
Bureau of Special Investigations of the
Puerto Rico Department of Justice,
*Petitioner,*

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, *et al.,*
*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Puerto Rico**

## REPLY BRIEF IN SUPPORT OF PETITION

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## REPLY BRIEF IN SUPPORT OF PETITION

In their statement, respondents offer a distorted picture of the history of the Cerro Maravilla investigation (Opp. 2-4). Their description of the Senate's work echoes the partisan manner in which the investigation itself has proceeded. The Governor and his senior department heads have provided the Senate investigation with thousands upon thousands of pages of documents, responding in full to numerous demands for material. The Governor and his aides have balked at responding only to those election-year requests that swept so broadly as to require burdensome searches for irrelevant material and for material that is at the core of executive privilege.

## ARGUMENT

### I. THE CASE INVOLVES A SUBSTANTIAL ISSUE OF FEDERAL LAW.

Respondents attempt to read federal law out of this case by asserting three propositions: (1) The "republican form of government" requirement in Public Law 600 is not justiciable; (2) Public Law 600 does not mandate a government of separation of powers; and (3) Puerto Rico is not like a territory at all, but has the same autonomy and status as a State does in allocating powers within its government. All three are incorrect.

1. The requirement in Public Law 600 that Puerto Rico organize and maintain a government in the "republican form" is justiciable. This Court has not totally foreclosed even judicial interpretation of the Guaranty Clause of the United States Constitution itself. *See, e.g., Minor v. Happersett,* 88 U.S. (21 Wall.) 162 (1875); *Duncan v. McCall,* 139 U.S. 449 (1891); *Forsyth v. Hammond,* 166 U.S. 506 (1897); *Baker v. Carr,* 369 U.S. 186 (1962); *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 9 n.8 (1982) (all addressing various components of the required form of government). In any event, this Court's concern with the justiciability of the constitutional guarantee "is primarily a function of the separation of powers." *Baker v. Carr, supra,* 369 U.S. at 210. By contrast, this case concerns merely the interpretation of a federal statute, a task clearly and unequivocally belonging to the federal judiciary. The issue in this case is: What limits did Congress intend to impose on the powers to be exercised by basic components of the Puerto Rico government when it insisted in Public Law 600 that Puerto Rico adopt and maintain a "republican form of government"? Even if the answer is "none," as respondents argue, this is a justiciable question.

2. The term "republican form of government" as used in 1950 in Public Law 600 does not have the limited meaning suggested by respondents.

The historical materials demonstrate that even in 1787, the Framers understood the term to require a government bound by the principles of "separation of powers" and "checks and balances." The Federalist Papers repeatedly speak of the separation of powers as the bulwark of republican government. Federalist No. 9, for instance, speaks of various principles unknown in ancient republics, the absence of which led to their failure. Those missing principles included the "regular distribution of power into distinct departments; the introduction of legislative balances and checks . . . ." *The Federalist,* No. 9 at 72 (New Amer. Lib. Ed. 1961). *See also id.,* No. 47 at 301; No. 51, at 321; and No. 66, at 401. Nor is this link between the "republican form of government" and the separation of powers in *The Federalist* an accident. As explained in a recent scholarly work, D. Epstein, *The Political Theory of The Federalist* (1984) (Chap. 5), this link between a proper "republican" government and the separation of the branches into limited, co-equal "departments" was crucial to the prevailing political philosophy of the Founders.

The ultimate issue here, however, is not what the Framers meant when they wrote the Guaranty Clause into the Constitution in 1787, but rather what Congress and the President meant when they authorized and ratified the Puerto Rico Constitution in the Compact of 1950-1952. By the middle of this century, the United States government and the government of every State reflected an unwaivering commitment to that system. In the absence of evidence to the contrary—which respondents concede does not exist—"words will be interpreted as taking their ordinary, *contemporary,* common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979) (emphasis added).

Moreover, an examination of the record of the approval of the Puerto Rico Constitution in 1952 by Congress and the President demonstrates that they actually understood that the concepts of a republican government and the separation of powers, as established in a government of three co-equal branches with distinct responsibilities, went hand-in-hand. *See* Pet. at 15 n.3; *see also* S. Rep. 1720, 82d Cong., 2d Sess. 2, 4, 5, 7, 8 (1952). For example, Rep. Murdoch explained why the people of Puerto Rico had complied with the obligation to create a republican form of government: "Based on the democratic principle that ultimate authority rests with the people, they have created a representative government with the three classical independent branches of the government—executive, legislative and judicial." 98 Cong. Rec. 6166 (1952). He also quoted a constitutional law expert in describing the proposed Puerto Rico Constitution: " 'It creates three independent departments of equal category, *as it should.* Each one of the three powers would act as a check and balance on the other'." *Id.* (emphasis added). Other congressmen made similar observations. *See, e.g.,* 98 Cong. Rec. 6168 (remarks of Rep. Miller); 6169 (remarks of Rep. Bentsen); 7837 (remarks of Sen. Malone); 7839, 7848 (remarks of Sen. Lehman); 7843, 7846 (remarks of Sen. Chavez); 7845 (remarks of Sen. O'Mahoney).

Respondents dismiss as "inapposite" to the recognition of congressional intent the decisions in *Springer v. Government of the Philippine Islands,* 277 U.S. 189 (1928), and *Camacho v. Civil Service Commission,* 666 F.2d 1257 (9th Cir. 1982) (Opp. 15). Respondents reject *Springer* because the statute at issue there was the congressionally adopted Organic Act for the Commonwealth of the Philippine Islands, which expressly divided that government's powers into three separate branches (Opp. 15-16). That statute, however, reflected Congress' under-

standing of what form of autonomous government should be permitted in American territories or commonwealths. This Court explained in *Springer* that the Organic Act, "following the rule established by the American constitutions, both state and federal, divides the government into three separate departments—the legislative, executive and judicial" and that "as a general rule inherent in the American constitutional system," this division makes each branch independent of the others and coequal with them. 277 U.S. at 201. When authorized to organize a government for themselves, but only on the condition that it reflect the "republican form of government," the people of Puerto Rico understood what structure this involves, and they formed—and Congress and the President appropriately approved—precisely this type of tripartite government. The decision in *Springer* pointed out the inherent restriction on a territorial legislature's attempt to expand its powers at the expense of the executive branch's responsibilities.

The respondents say that *Camacho,* which involves the recently chartered Commonwealth of the Northern Mariana Islands, supports their position because Congress stipulated that the people of that territory had to adopt a constitution that would "provide for a republican form of government *with separate executive, legislative and judicial branches* . . . ." 48 U.S.C. § 1681 note (emphasis added). Respondents seize on the inclusion of the underscored language as implying that the "republican form" requirement of Public Law 600, which did not include that specificity, must have meant that the people of Puerto Rico were not obliged to adopt this tripartite form of government separated into coequal branches (Opp. 16-17). The language of the Northern Mariana charter, however, shows that the underscored language is merely a matter of clarification and definition, not an additional or otherwise optional element. Instead, as the

language makes clear, Congress was defining for the people of those Pacific Islands what everyone familiar with "the American constitutional system" (*Springer, supra,* 277 U.S. at 201) understands to be the essential ingredient of the republican form of government. Neither Congress nor the people of Puerto Rico in 1950-1952 had any doubt about this proposition, because the Puerto Rico Constitution appropriately—and necessarily—conformed to this structure.

Thus, the respondents miss the point in contending that the petitioner in this case is somehow challenging the 1952 congressional and presidential approval of that constitution as satisfying the "republican form of government" requirement (Opp. 14-15). The issue raised in this case is whether the legislature's current assertion of immunity vis-a-vis the Executive Branch *exceeds* the authority permitted by Public Law 600 under this system.

3. Respondent's political argument that Puerto Rico has the autonomy of a State in deciding how to allocate government powers and immunities (Opp. 19-21) ignores the reality behind Public Law 600. There is ample evidence in the legislative history of Public Law 600 that, although Congress intended to allow Puerto Rico a great deal of latitude in its internal affairs, Congress explicitly declined to grant Puerto Rico *all* the power and autonomy that a State would enjoy, unless and until the people of Puerto Rico applied for statehood and Congress extended it. Congress intended to retain ultimate federal authority over Puerto Rico.

Much of the testimony of the leading proponents of the Compact demonstrates that federal law continues to govern this issue. As Puerto Rico's Resident Commissioner in Congress, Fernos-Isern, who sponsored the proposed Compact, stated in the congressional hearings on the bill:

> ". . . the road to the courts would always be open to anybody who found that an amendment to the

> constitution went beyond the framework laid down by Congress; and, secondly, the authority of the Government of the United States, of this Congress, to legislate in case of need would always be there." *Hearings before the Committee on Public Lands on H.R. 7674 and S. 3336,* 81st Cong., 2d Sess. 33 (1950).

Governor Munoz Marin offered similar analysis. *Id. See also* H.R. Rep. 2275, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 2681, 2682. Over on the Senate side, a similar intent to limit Puerto Rico's autonomy under the Compact was expressed. *See Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 151,* 82d Cong., 2d Sess. 43-45 (1952) (testimony of Mr. Silverman, Chief Counsel of the Office of Territories). Moreover, to leave no doubt about the matter, Congress conditioned its 1952 approval of the proposed Puerto Rico Constitution on inclusion of a new section, which was then added, expressly recognizing that any future amendment to the Constitution would have to be "consistent with," *inter alia,* Public Law 600. P.L. 447, 82d Cong., *reprinted in* [1952] U.S. Code Cong. & Ad. News 321.

Although the respondents quote snippets from some cases indicating that for *some* purposes Puerto Rico is to be treated like a State of the Union, the case law also offers many examples of instances where Puerto Rico is considered not essentially a State but rather a territory. In *Harris v. Rosario,* 446 U.S. 651 (1980), this Court itself recently treated Puerto Rico's current status as that of a territory subject to plenary congressional power under Article IV of the Constitution:

> "Congress, which is empowered under the Territory Clause of the Constitution, U.S Const., Art. IV, § 3, cl 2, to 'make all needful Rules and

> Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions." 446 U.S. at 651-52.

Thus, Public Law 600 manifests Congress' continuing plan for the government of Puerto Rico, and in the words of Rep. Fernos-Isern in 1952, "the road to the courts would always be open to anybody" who shows that the Puerto Rico government is going "beyond the framework laid down by Congress. . . ."

4. Respondents make little attempt to justify their actions, or the decision below, on the merits. In the body of their brief, they ignore the issue of legislative immunity from suit. Respondents devote one sentence in a footnote to the complicated issue of legislative immunity, and simply assert that because the Senate's investigation was "legitimate," the petitioner could not press his subpoenas (Opp. 29 n.18). Instead, respondents make gratuitous and conclusory comments about why this case differs from *United States v. Nixon,* 418 U.S. 683 (1974). Those comments fail to respond to petitioner's careful analysis of the factors and interests to be weighed, which were ignored by the courts below (Pet. 13-14).

## II. THE FEDERAL ISSUE IS ADEQUATELY PRESENTED.

1. Respondents make much of the fact that the petitioner did not specifically discuss the impact of the 1950-1952 Compact until he filed a concededly timely motion for reconsideration in the Puerto Rico Supreme Court (Opp. 8-10). In doing so, however, they ignore the central thrust of petitioner's argument: that clashes between the branches of the Puerto Rico government over their respective powers vis-a-vis one another are at bottom issues of federal law, because the congressional plan embodied in Public Law 600 governs their outcome. The

issues in this case, therefore, inherently arose under federal law and required consideration of federal law to resolve them. Therefore, the discussion in the motion for reconsideration is legally irrelevant to determining this Court's jurisdiction. Because the petitioner's claim of right in the lower court was a right "under" the laws of the United States, this Court has jurisdiction under 28 U.S.C. § 1258(3) to review the judgment sustaining the respondents' immunity from producing evidence in an investigation at the core of the Executive Branch's obligation to enforce the law.

2. Finally, respondents attack this Court's jurisdiction on the ground that the lower court's single, unelaborated citation to Article III, Section 14 of the Puerto Rico Constitution establishes that the lower court relied solely on local law rather than on federal law under the Speech or Debate Clause in reaching its decision (Opp. 21-27). That argument requires this Court to ignore the Puerto Rico Supreme Court's reliance on the Superior Court's "exhaustive analysis of the applicable Constitutional doctrines." (Pet. App. 2a.) The Superior Court, in turn, had looked to this Court's decisions in cases under the Speech or Debate Clause in reaching its conclusion (Pet. App. 3b-7b). The court's view that federal precedents and standards are intertwined with the proper interpretation of Puerto Rico legislative immunity was understandable because, as respondents recognize (Opp. 26), the local clause "descends from the parliamentary immunity clauses of the Anglo-American tradition."

Under these circumstances, this Court's decision in *Michigan v. Long*, ___ U.S. ___, 77 L.Ed.2d 1201 (1983) is right on point: because "the adequacy and independence of any possible state law ground is not clear from the face of this opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 77 L.Ed.2d at 1214. Despite

respondent's contention to the contrary (Opp. 27 n.17), the Puerto Rico Supreme Court did "endorse" the Superior Court's "exposition of federal cases." The single citation to Article III, Section 14 does not dispel the ambiguity nor eliminate this Court's authority to clarify the misconstruction of federal principles upon which the Puerto Rico courts appear to have relied in reaching their decisions, not "merely for guidance" (Opp. 27 n.17) but as justifying their broad interpretation of the respondents' immunity from suit. Under these circumstances, this Court has held that it will "merely assume that there is [no adequate and independent state grounds] when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." 77 L.Ed.2d at 1215. For this additional reason, therefore, this Court has jurisdiction under 28 U.S.C. § 1258(3) to review the decision below.

## CONCLUSION

Certiorari should be granted.

Respectfully submitted.

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